

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

Investigation by the Department of Telecommunications)
and Energy on its own Motion into the Appropriate)
Regulatory Plan to succeed Price Cap Regulation for)
Verizon New England, Inc. d/b/a Verizon Massachusetts')
intrastate retail telecommunications services in)
the Commonwealth of Massachusetts)

D.T.E. 01-31-Phase II

July 2, 2002

HEARING OFFICER RULING ON LATE FILED PETITION TO INTERVENE OF XO
MASSACHUSETTS, INC. AND MOTION OF KAREN NATIONS TO APPEAR PRO
HAC VICE ON BEHALF OF XO MASSACHUSETTS, INC.

I. INTRODUCTION

On June 12, 2002, XO Massachusetts, Inc. ("XO") filed with the Department of Telecommunications and Energy a petition for intervention in an ongoing Department proceeding, D.T.E. 01-31. Also on June 12, 2002, Karen Nations filed with the Department a Motion to Appear Pro Hac Vice on behalf of XO in D.T.E. 01-31. The Department received no opposition to either motion.

II. POSITION OF THE PETITIONER

In its Petition to Intervene, XO states that XO is authorized by the Department to provide telecommunications services throughout the Commonwealth, and currently provides services in areas including metropolitan Boston (Petition at 1). XO requests that it be permitted to intervene as a party in order to adequately represent and protect its interests in this proceeding (*id.*). XO states that as a customer and competitor of Verizon, XO is substantially and specifically affected by any changes to Verizon's regulatory plan as a result of this proceeding (*id.*). XO states that its interests cannot be adequately represented by any other party, and that its participation will help ensure a comprehensive record (*id.* at 1-2). XO states that it received no notice of the proceeding when the Department initiated the proceeding and was therefore unaware of the need to intervene or participate earlier (*id.* at 2). XO states that it remained unaware of the proceeding until it received a copy of a brief from the Attorney General of the Commonwealth, a party in this case (*id.*). XO argues that, as the Department has just begun a second phase of this proceeding, intervention at this time is appropriate.

In the Motion of Karen Nations to Appear Pro Hac Vice on behalf of XO in this proceeding, Attorney Nations states that she is member in good standing of the New Jersey, New York, and District of Columbia bars (Motion to Appear at 1).

III. STANDARD OF REVIEW

A. Petitions to Intervene

Regardless of whether a petition for intervention is filed timely or late, the Department's regulations require such a petition to describe how the petitioner is "substantially and specifically affected" by a proceeding. 220 C.M.R. § 1.03(1)(b); see also G.L. c. 30A, § 10. In interpreting this standard, the Department has broad discretion in determining whether to allow participation, and the extent of participation, in Department proceedings. See Attorney General v. Dept. of Pub. Utils., 390 Mass 208, 216 (1983); Boston Edison Co. v. Dept. of Pub. Utils., 375 Mass. 1, 45 (1978) (with regard to intervenors, the Department has broad, but not unlimited discretion), cert. denied, 439 U.S. 921 (1978) ("Boston Edison"); see also Robinson v. Dept. of Pub. Utils., 835 F.2d 19 (1st Cir. 1987). The Department may allow persons not substantially and specifically affected to participate in proceedings for limited purposes. G.L. c. 30A, § 10; 220 C.M.R. § 1.03(1)(e); Boston Edison, 375 Mass. at 45. A petitioner must demonstrate a sufficient interest in a proceeding before the Department will exercise its discretion and grant limited participation and it is not required to allow all petitioners seeking intervenor status to participate in proceedings. Id.

Should the hearing officer agree that the petitioner meets the threshold mentioned above, then when ruling on late-filed petitions to intervene, the hearing officer must balance the extent of participation against the need to conduct a proceeding in a complete, efficient, and orderly fashion. See Transition Costs, D.P.U. 94-104-B, at 5 (January 8, 1995) (Order on Hearing Officer Ruling Denying Late Petition to Intervene by MASSPOWER and Altresco Pittsfield, L.P.); see also New England Telephone and Telegraph Co., D.P.U. 94-50, at 3, Order on Appeal by Mark Brown of Hearing Officer Ruling Denying Late-Filed Petition to Intervene (July 22, 1994) ("NYNEX").

In ruling on late-filed petitions to intervene, or otherwise participate in its proceedings, the Department takes into account a number of requirements and factors in its analysis. First, the Department considers whether a petitioner has demonstrated good cause for filing late. See 220 C.M.R. § 1.01(4). While "good cause" may not be readily susceptible of precise definition, the proponent of a waiver must make a convincing showing of good cause and may not reserve such a showing for a later appeal of the hearing officer's ruling. See Bay State Gas Co., D.P.U. 95-52, at 2, Interlocutory Order (July 21, 1995). Administrative efficiency requires that a proponent of a waiver state all available grounds at the time the ruling is requested. If the Department finds that there is good cause and that the petitioner is

substantially and specifically affected, then the Department balances the extent of participation against the need to conduct a proceeding in a complete, efficient, and orderly fashion.¹

B. Motions to Appear Pro Hac Vice

Where a party to a proceeding before the Department retains counsel not licensed to practice within the Commonwealth of Massachusetts, the Department may require that counsel to file a Motion Pro Hac Vice reciting his or her qualifications to appear before the Department. Typical qualifications considered by the Department are that the counsel is a member in good standing of a state or federal bar and that counsel intends to abide by the Department's rules, procedures, and timetables.

IV. ANALYSIS AND FINDINGS

When reviewing any petition to intervene, late or timely filed, the hearing officer must first determine whether the petitioner is substantially and specifically affected by the proceeding. I determine that as a substantial provider of telecommunications services and as a qualified competitive local exchange carrier in the Commonwealth, XO is substantially and specifically affected by this proceeding. I agree that, as both a customer of and competitor to the incumbent provider, changes in the regulatory framework governing Verizon could affect XO's ability to compete against Verizon in Massachusetts.

However, this proceeding has been ongoing for a considerable time. The Department issued its Vote and Order Opening Proceeding on February 27, 2001. In the Legal Notice of Investigation and Public Hearings, the Department established April 17, 2001, as the deadline for filing petitions to intervene in this proceeding.² Early on in the case, the Department decided to bifurcate the proceeding into phases, the first of which would be an investigation into the sufficiency of competition for those services for which Verizon sought pricing flexibility (i.e., Verizon's retail business services as indicated in its Proposed Plan of April 12, 2001). See Verizon, D.T.E. 01-31, Interlocutory Order on Scope (June 21, 2001). On May 8, 2002, following a comprehensive investigation into the state of competition in the Commonwealth, the Department issued its Phase I Order, effectively completing the first phase of the proceeding, and opening the second phase. In the Phase I Order, the Department concluded that, with the safeguards in place discussed in the Order, there was sufficient competition for the majority of Verizon's retail business services to permit Verizon market-

¹ When performing the balancing analysis, the Department has considered: (1) the extent of the delay; (2) the effect of the late participation on the ongoing proceeding; and (3) the explanation for the tardiness. See Western Massachusetts Electric Co., D.P.U. 92-8C-A at 5 (1993); see also NYNEX, D.P.U. 94-50, at 3 (1994).

² XO's petition was, therefore, almost fourteen months late.

based pricing flexibility for those services. The Department determined that Phase II would consist of an evaluation of Verizon's compliance with the conclusions in the Phase I Order, as demonstrated by Verizon's June 5, 2002 filing, as well as an investigation into the appropriate regulatory framework for Verizon's retail residential services, based on a series of "tentative conclusions" on Verizon's residential services reached by the Department in the Phase I Order.

Therefore, as Phase I of this proceeding has been completed, and XO indicated in its petition that it is willing to take the case as it finds it, I will treat XO's petition as a request to intervene in Phase II only. Because Phase II has been underway for less than two months, and we have not yet established a full procedural schedule for this phase, I have less of a concern about the extent of XO's tardiness in petitioning to intervene.³ In balancing XO's need to intervene with the interests of the Department to conduct a proceeding in a complete, efficient, and orderly fashion, I find that XO's delay in filing its petition will not cause prejudice to other parties or delay the proceeding so long as XO adheres to the procedural schedule to be established for Phase II and does not attempt to re-litigate issues previously decided in Phase I. Accordingly, I grant the petition to intervene filed by XO as an intervenor with full participation rights in Phase II of this proceeding. XO shall abide by the procedural schedule and any subsequent revisions and shall not delay these proceedings as a result of its lack of participation in Phase I.

Turning to Attorney Nations' Motion to Appear Pro Hac Vice, I determine that Attorney Nations has demonstrated sufficient qualifications to appear before the Department in this matter and has stated that she intends to comply with the procedural schedule as established. Therefore, I grant the Motion to Appear Pro Hac Vice for Phase II of this proceeding.

V. RULING

XO Massachusetts, Inc.'s Petition to Intervene in Phase II, and Karen Nations' Motion to Appear Pro Hac Vice on behalf of XO Massachusetts, Inc. in this proceeding are granted.

Under the provisions of 220 C.M.R. § 1.06(6)(d)(3), any party may appeal this Ruling to the Commission by filing a written appeal with supporting documentation within five (5) days of this Ruling. Any appeal must include a copy of this Ruling.

³ I remain concerned about XO's claim that it did not receive notice of the proceeding. XO is advised to check with the Administrative Services Division of the Department to ascertain whether it is included on the list of carriers that asked to be placed on a general notification list pursuant to 220 C.M.R. § 2.09.

Date: July 2, 2002

_____/s/_____
Paula Foley, Hearing Officer